Talam Corp Bhd & Anor v Bangkok Bank Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–1245 OF 2010
AZIMAH OMAR JC
22 OCTOBER 2015

Land Law — Charge — Sale of land — Chargor failed to challenge market value of land in valuation report filed by chargee during charge action — Property sold subject to reserve price in valuation report — Chargor subsequently brought action to recover difference between reserve price and market value of land — Whether chargor entitled to do so — Whether chargor's failure to challenge valuation report amounted to failure to prove any measure of damages or loss suffered

In consideration for the first defendant ('the bank') granting banking facilities to a customer ('Keuro Leasing'), the second plaintiff ('CHDSB') executed a third-party charge over one of its lands ('the property') to the bank. Owing to Keuro Leasing's default under the banking facilities, the bank commenced foreclosure proceedings in the High Court and sold the property by public auction after getting the reserve price fixed through the submission to court of a valuation report ('the TD Aziz report') on the property. Initially, CHDSB informed the court that it would be challenging the TD Aziz report but it failed to do so and instead filed a separate application challenging the foreclosure proceedings as a whole on the grounds there was improper service of the foreclosure papers and also because the bank knew of a 'settlement agreement' between the Menteri Besar Incorporated ('MBI') and the first plaintiff ('Talam') under which one of the terms of settlement was for the property to be redeemed from the bank. CHDSB's application was only heard after the property was successfully auctioned. The High Court dismissed the application and the decision was upheld by the Court of Appeal. Talam was never a party in the foreclosure proceedings nor was it a party to the bank's dealings with either Keuro Leasing or CHDSB. In the instant action, however, Talam claimed it had a beneficial interest in the property under the settlement agreement under which CHDSB allegedly vested all its rights in the property to Talam to allow it to dispose of the property. Talam contended that the defendants, by their conduct, were estopped from denying Talam's proprietary interest in the property and that the bank owed Talam a duty of care in tort and equity to protect its rights in the property. At all material times, Talam was a shareholder in a company named Maxisegar which was the majority shareholder in an entity named Cekap Mesra. CHDSB had joint-venture agreements with Cekap Mesra under which CHDSB allegedly covenanted to hold the property as a bare trustee for Cekap Mesra's benefit. In the instant action, the plaintiffs sought, inter alia, RM33,697,902 against the defendants

(the second defendant was a former assistant manager of the bank) being the difference between the auction reserve price and the market value of the property and general damages for the defendants' breach of duty of care towards the plaintiffs and their conduct in preventing the plaintiffs from redeeming the property before the auction.

Held, dismissing the claim:

(1) CHDSB as chargor failed to challenge the TD Aziz valuation report during the charge action. The absence of challenge was the chargor's acknowledgement that the valued market price was proper and not in any way improper against its interest. It was thus no longer open for the plaintiffs to contend against the price at which the property was auctioned off. The failure to challenge the report was failure to prove any measure of damages or loss. The plaintiffs had failed to prove their case on balance of probabilities (see paras 125–127 & 147).

(2) There was no reason for the bank to have looked beyond its diligence to ascertain the market price of the property for the mutual benefit of the bank and the chargor. Talam did not hold any rights over the property. There was no reason for the bank to consider the settlement agreement which concerned Talam who was foreign to the charge and, in fact, was never in any position to deal with CHDSB's assets at all and/or at any material time. Furthermore, even without adherence and agreement to the terms purported in the bogus agreement, the bank issued a redemption statement for CHDSB to redeem the property in pursuing the supposed settlement which the plaintiffs ultimately failed to obtain in the duration of the validity of the redemption statement (see paras 84, 137 & 138).

(3) The court found that CHDSB did not hold the property on bare trust for Cekap Mesra. Flowing from this fact, there was no beneficial interest Talam could claim to begin with arising from Cekap Mesra. No shareholder had any rights over a company's assets. Thus, even if there was a bare trust between CHDSB and Cekap Mesra, Talam still could not claim any degree of rights (be it beneficial or actual rights) over the assets of Cekap Mesra; what more considering Talam was not even a direct shareholder in Cekap Mesra (see paras 61, 63 & 74).

(4) The court doubted the authenticity of the settlement agreement relied on by the plaintiffs and found it to be inadmissible for failing to fulfill the criteria for admissibility under s 73A(1) of the Evidence Act 1950. Even if the settlement agreement was admissible, it had no bearing at all in the instant case as the bank was not a party or privy to it. The signatories to the settlement agreement were only MBI and Talam. The settlement agreement was not enforceable against the bank to defeat its statutory right to foreclose the property (see paras 39, 54, 56 & 58).

(5) The defendants did not owe any duty of care to Talam which was a foreigner and stranger to the charge. In issuing the redemption statement to give an opportunity to MBI to redeem the land, the bank never intended to play by the rules of the settlement agreement and completely reserved its rights to continue with the auction proceedings. The bank did nothing to commit or agree to the settlement agreement and never at any point in time deserted or abandoned its stance to follow through with the auction proceedings. There was nothing that could be inferred from the defendants' conduct that was capable of raising any estoppel against them or which gave rise to any legitimate expectation on the part of the plaintiffs that the defendants would adhere to the settlement agreement (see paras 107, 114, 121–123 & 140)

[Bahasa Malaysia summary

Sebagai pertimbangan untuk defendan pertama ('bank') memberikan kemudahan perbankan kepada pelanggan ('Keuro Leasing'), plaintif kedua ('CHDSB') menyempurnakan gadaian pihak ketiga ke atas salah satu tanah ('hartanah') kepada bank. Disebabkan pelanggaran Keuro Leasing di bawah kemudahan perbankan, bank memulakan prosiding perampasan di Mahkamah Tinggi dan menjual hartanah tersebut melalui lelongan awam selepas mendapat harga rizab yang ditetapkan melalui pengemukaan laporan penilaian ke mahkamah ('laporan TD Aziz') berhubung hartanah tersebut. Pada mulanya, CHDSB memaklumkan kepada mahkamah bahawa ia akan mencabar laporan TD Aziz tetapi ia gagal berbuat demikian dan sebaliknya memfailkan permohonan berasingan mencabar prosiding perampasan secara keseluruhan atas alasan terdapat serahan tidak wajar kertas perampasan dan juga kerana bank tahu mengenai 'perjanjian penyelesaian' di antara Menteri Besar Incorporated ('MBI') dan plaintif pertama (''Talam') di mana salah satu daripada terma-terma penyelesaian adalah agar hartanah tersebut ditebus daripada bank. Permohonan CHDSB hanya didengar selepas hartanah tersebut berjaya dilelong. Mahkamah Tinggi menolak permohonan tersebut dan keputusan tersebut dikekalkan oleh Mahkamah Rayuan. Talam tidak pernah menjadi pihak dalam prosiding perampasan dan juga bukan pihak kepada urusan bank dengan Keuro Leasing ataupun CHDSB. Dalam tindakan ini, bagaimanapun, Talam mendakwa ia mempunyai kepentingan benefisial dalam hartanah di bawah perjanjian penyelesaian di mana CHDSB didakwa meletakkan semua haknya dalam hartanah itu kepada Talam untuk membolehkannya untuk melupuskan hartanah tersebut. Talam menegaskan bahawa defendan, melalui tindakan mereka, telah diestop daripada menafikan kepentingan proprietari Talam dalam hartanah tersebut dan bank berhutang dengan Talam tugas yang dipertanggungjawabkan dalam tort dan ekuiti untuk melindungi haknya dalam hartanah tersebut. Pada semua masa material, Talam merupakan pemegang saham dalam sebuah syarikat yang dinamakan Maxisegar yang merupakan pemegang saham majoriti dalam sebuah entiti yang dipanggil Cekap Mesra. CHDSB mempunyai perjanjian usaha sama

dengan Cekap Mesra di mana CHDSB didakwa berjanji untuk memegang hartanah tersebut sebagai pemegang amanah asas untuk faedah Cekap Mesra. Dalam tindakan ini, plaintif menuntut, antara lain, RM33,697,902 terhadap defendan-defendan (defendan kedua adalah bekas penolong pengurus bank) iaitu perbezaan antara harga lelong rizab dan nilai pasaran hartanah itu dan ganti rugi am bagi pelanggaran tanggungjawab menjaga defendan terhadap plaintif dan tingkah laku mereka dalam menghalang plaintif daripada menebus hartanah sebelum lelongan.

Diputuskan, menolak tuntutan:

(1) CHDSB sebagai penggadai gagal untuk mencabar laporan penilaian TD Aziz semasa tindakan gadaian. Ketiadaan cabaran merupakan pengakuan penggadai bahawa harga pasaran yang dinilai adalah wajar dan tidak dalam mana-mana cara tidak berpatutan dengan faedahnya. Oleh itu, ia tidak lagi dibuka untuk plaintif menentang terhadap harga di mana hartanah itu dilelong. Kegagalan untuk mencabar laporan itu merupakan kegagalan untuk membuktikan apa-apa ukuran ganti rugi atau kerugian. Plaintif telah gagal membuktikan kes mereka pada imbangan kebarangkalian (lihat perenggan 125–127 & 147).

(2) Tiada alasan untuk bank bertindak di luar usaha untuk menentukan harga pasaran hartanah untuk faedah bersama bank dan penggadai. Talam tidak memegang apa-apa hak ke atas hartanah tersebut. Tiada alasan untuk bank mempertimbangkan perjanjian penyelesaian perkaitan Talam, seseorang asing terhadap gadaian tersebut dan, sebenarnya, tidak pernah dalam mana-mana kedudukan berurusan dengan aset-aset CHDSB dan/atau pada mana-mana masa material. Tambahan pula, walaupun tanpa kepatuhan dan persetujuan kepada terma-terma yang didakwa dalam perjanjian palsu tersebut, bank mengeluarkan penyata penebusan untuk CHDSB menebus hartanah dalam meneruskan penyelesaian yang sepatutnya di mana plaintif akhirnya gagal untuk memperolehnya dalam tempoh kesahihan penyata penebusan (lihat perenggan 84, 137 & 138).

(3) Mahkamah mendapati bahawa CHDSB tidak memegang hartanah atas 'bare trust' untuk Cekap Mesra. Daripada fakta ini, tiada kepentingan benefisial sedari awal boleh dituntut Talam yang timbul daripada Cekap Mesra. Tiada pemegang saham yang mempunyai sebarang hak ke atas aset-aset syarikat. Oleh itu, walaupun jika terdapat satu 'bare trust' di antara CHDSB dan Cekap Mesra, Talam masih tidak boleh menuntut apa-apa hak (sama ada hak-hak benefisial atau sebenar) ke atas aset-aset Cekap Mesra; apatah lagi memandangkan Talam bukannya pemegang saham secara langsung dalam Cekap Mesra (lihat perenggan 61, 63 & 74).

(4) Mahkamah meragui kesahihan perjanjian penyelesaian yang dijadikan

sandaran oleh plaintif dan mendapati perjanjian tersebut tidak boleh diterima kerana gagal memenuhi kriteria untuk kebolehterimaan di bawah s 73A(1) Akta Keterangan 1950. Walaupun perjanjian penyelesaian tersebut diterima, perjanjian tersebut tidak berfaedah sama sekali dalam kes ini kerana bank tersebut tidak terlibat atau privi kepada perjanjian penyelesaian tersebut. Penandatangan perjanjian penyelesaian itu hanya MBI dan Talam. Perjanjian penyelesaian tidak boleh dikuatkuasakan terhadap bank untuk mengalahkan hak statutorinya untuk merampas hartanah yang dirampas (lihat perenggan 39, 54, 56 & 58).

(5) Defendan tidak berhutang apa-apa tugas yang dipertanggungjawabkan kepada Talam yang merupakan warga asing dan orang asing kepada pertuduhan tersebut. Dengan mengeluarkan penyata penebusan untuk memberi peluang kepada MBI untuk menebus tanah tersebut, bank tidak pernah merancang untuk mengikut peraturan perjanjian penyelesaian dan memelihara haknya secara mutlak untuk meneruskan dengan prosiding lelongan. Bank tersebut tidak melakukan apa-apa atau bersetuju dengan perjanjian penyelesaian dan tidak pernah pada bila-bila masa meninggalkan atau mengabaikan pendiriannya untuk mematuhi prosiding lelongan tersebut. Tiada apa yang boleh disimpulkan daripada perlakuan defendan yang mampu menimbulkan apa-apa estopel terhadap mereka atau yang menimbulkan apa-apa jangkaan sah di pihak plaintif bahawa defendan-defendan akan mematuhi perjanjian penyelesaian (lihat perenggan 107, 114, 121–123 & 140)]

Notes

For cases on sale of land, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3080–3084.

Cases referred to

Affin Bank Berhad v Mohd Kassim Ibrahim [2013] 1 CLJ 465, FC (refd)
Allied Bank (M) Sdn Bhd v Yau Jiok Hua [2006] 5 MLJ 145, CA (refd)
Allied Bank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1, HC (refd)
Architype Projects v Dewhurst MacFarlane & Partners (A Firm) [2004] PNLR 39 (refd)
Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd and Others (1978) 19 ALR 519, HC (refd)
Bank Bumiputera Malaysia Bhd v Doric Development Sdn Bhd & 2 Ors [1988] 1 MLJ 462 (refd)
Barings Plc (in liquidation) & Anor v Coopers & Lybrand (A Firm) & Ors [2002] PN 16, CA (refd)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad

[1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Burgess v Auger and another [1998] 2 BCLC 478, Ch D (folld)
Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd [1979] 1 WLR 401, CA (refd)
CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779, FC (folld)
Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)
Donoghue v Setevenson [1932] AC 562, HL (refd)
Forsyth & Another v Blundell & Others [1973] 129 CLR 477, HC (refd)
Golf Cheque Book Sdn Bhd, The & Anor v Nilai Springs Bhd [2006] 1 MLJ 554; [2006] 1 CLJ 259, CA (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520, HL (distd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Loh Chiak Eong & Anor v Lok Kok Beng & Ors [2013] 1 MLJ 27; [2012] 9 CLJ 699, CA (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Macaura v Northern Assurance Co Ltd & Ors [1925] AC 619, HL (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662; [1997] 2 CLJ 516, CA (refd)
Malayan United Finance v Tay Lay Soon [1991] 1 MLJ 504, SC (refd)
Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd [2010] 1 MLJ 822, CA (folld)
PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417, CA (refd)
Palk v Mortgage Services Funding Plc [1993] Ch 330, CA (refd)
People Realty Sdn Bhd v Hong Leong Bank Bhd & Anor [2007] 6 MLJ 595, CA (refd)
Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd [2006] 5 MLJ 21, FC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (folld)
Serangoon Garden Estate Ltd v Marian Chye [1959] 1 MLJ 113 (refd)
Stovin v Wise [1996] AC 923, HL (refd)
Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 3 CLJ 141, FC (refd)
Tate Access Floors Inc & Anor v Boswell & Ors [1991] Ch 512, Ch D (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Companies Act 1965 s 132C(1)(b)
Contracts Act 1950

Evidence Act 1950 ss 62, Explanations 1, 2, 73A(1)
National Land Code ss 100, 256, 256(3)

Chin Tzi Seng (K Chandrasekar and Emmy Hazwani Jamil with him) (Arifin & Partners) for the plaintiffs.
Oommen Kurien (Celine Chelladurai and Ain Aissa with him) (Zaid Ibrahim & Co) for the respondent.

Azimah Omar JC:

BACKGROUND FACTS

[1] The present case in its purest essence is a very simple case that the plaintiffs are claiming an alleged loss from the successful sale by a charge/foreclosure action when a charged security was put on the auction block. However, this simple case is wrought with a convoluted narrative led by the plaintiffs, especially in their attempt to draw an alleged nexus between an altogether foreign entity (referring to the first plaintiff ('Talam Corp Bhd')) outside of the facilities agreement and even the charge encumbering the property involved. This court sees the importance of defining each and every party's interest and relations before delving further into the determination of the present case. This is especially important so as to accurately understand and segregate each party's interest because although the plaintiffs are mutual litigators in the present case, not necessarily the interest that they lead are one and the same.

[2] In the simplest manner possible, the first defendant (Bangkok Bank Bhd ('the bank')) is a public limited company incorporated in Malaysia under the Companies Act 1965 with its principal activities including banking and banking-related financial services. The bank shall also be referred to interchangeably as ('chargee') and as and when it is necessary as the bank for it at all times is also the chargee in the present case.

[3] The second defendant ('Rajendran Palaniappan') is the former employee of the bank holding the position of an assistant manager in the risk management department until his resignation in September 2013.

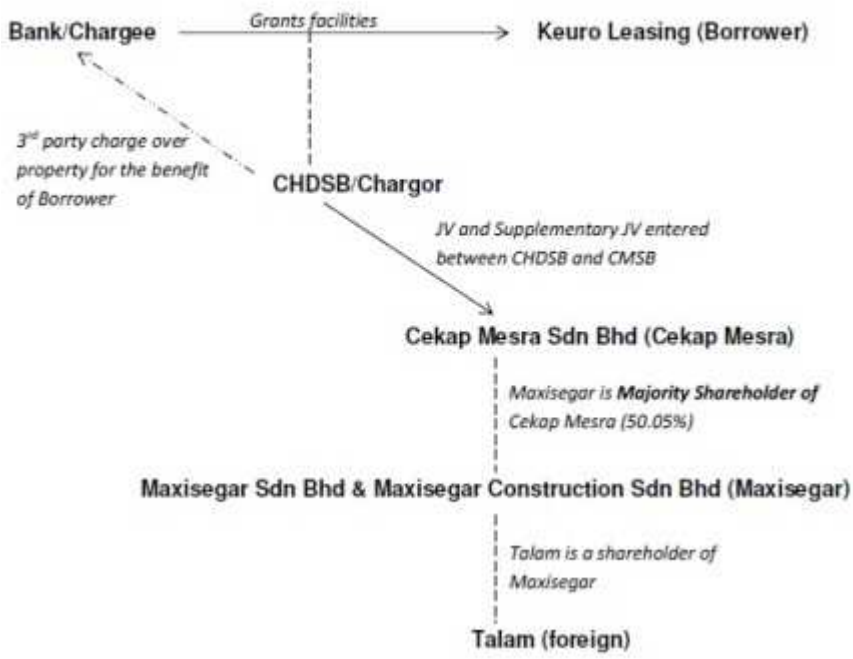
[4] The first plaintiff ('Talam') is a public limited company also locally incorporated in Malaysia. In a strict contractual sense, Talam is entirely foreign to the facilities agreement binding the bank with its customer being granted facilities ('Keuro Leasing') and is also entirely foreign to the charge documents executed between the bank and the second plaintiff (Continental Heights Development Sdn Bhd ('CHDSB')). Although Talam claims beneficial interest

in an array of tangents, it stands that the status quo is that Talam is and was never a party to the facilities agreement and the charge document binding the bank and the second plaintiff.

[5] The second plaintiff ('CHDSB') is a private limited company locally incorporated in Malaysia having its nature in business as property development.

[6] Now, to visually illustrate the relationship between the above parties, and the ground in which this court preliminarily deems Talam to be foreign, this court draws the following Relationships Chart (Illustration 1).

Ilustration 1


Bank/Chargee
Grants facilities
Keuro Leasing (Borrower)
3rd party charge over property for the benefit of Borrower
CHDSB/Chargor
JV and Supplementary JV entered between CHDSB and CMSB
Cekap Mesra Sdn Bhd (Cekap Mesra)
Maxisegar is Majority Shareholder of Cekap Mesra (50.05%)
Maxisegar Sdn Bhd & Maxisegar Construction Sdn Bhd (Maxisegar)
Talam is a shareholder of Maxisegar
Talam (foreign)

[7] The core facts of the present case in explaining the above illustration are simply the following.

Successful foreclosure proceedings

[8] Following a line of letters of offer, the bank has granted the borrower (Keuro Leasing, who is not a party in the present dispute) certain banking facilities to which the borrower have undisputedly defaulted.

[9] CHDSB at the material time then (before the successful auction) was the owner and registered proprietor of the Danau Putra Land covering 134.23 acres of land held under Title Nos HS(D) 2490 PT No 6253 ('Plot D'), HS(D) 2489 PT No 6252 (Plot C) and a portion of HS(D) 2488 PT No 6251 (Plot B) Mukim of Dengkil, District of Sepang, of the State of Selangor ('properties'). CHDSB subsequently put one of the properties namely, HS (D) 2489 PT No 6252 (PN 39252 Lot No 14002 measuring approximately 74 acres) ('property') as security for a third party charge to the bank in favour of the borrower.

[10] Naturally, the bank moved to foreclose the security and ultimately managed to auction off the land at a reserve price of RM15m on 7 September 2010. Of course, there were a plethora of facts that ensued during the whole procession leading from the grant of the order for sale unto the sale itself. However, in view of clarity and simplicity, this court shall not divulge the entirety of the core facts in this part of the judgment and shall address those facts as and when the parts of this judgment necessitate the discussion of those facts.

Challenge by CHDSB against the foreclosure action

[11] During the hearing for summons for direction on 8 March 2010, CHDSB's previous solicitors (Messrs Ricky Tan & Co) has informed the court that CHDSB intends to reply to the bank's affidavit exhibiting the TD Aziz evaluation report ('TD Aziz report'). Consequently the hearing was adjourned to 1 April 2010. In the midst of the proceedings regarding the TD Aziz report, CHDSB then filed its own application by way of summons in chambers on 26 March 2010 in an attempt to challenge the foreclosure proceedings. The grounds of this application includes, an allegation that there was improper service of the foreclosure papers, there was an impending settlement between Menteri Besar Incorporated ('MBI') and Talam in which one of the terms of settlement is to redeem the property from the bank.

[12] However, surprisingly on 1 April 2010 CHDSB contras its own stance to challenge the TD Aziz report (to which this court preliminarily deems to be an abject failure to challenge) and instead expresses its intention to only pursue its application for summons in chambers.

[13] Verily unsurprisingly enough, upon the hearing of CHDSB's summons in chambers on 24 September 2010 (which is after the auction was conducted),

the learned YA Dato Zaleha bt Yusof has dismissed the application in toto with costs of RM2,000. This resounding dismissal was further appealed by CHDSB to the Court of Appeal vide its notice of appeal dated 8 October 2010. The Court of Appeal dismissed CHDSB's appeal with costs of RM5,000.

[14] The reason in which this court finds the above decisions and dismissals are unsurprising is simply for the reason that this court from the outset is at the very least disillusioned and disenchanted by the convoluted contentions led by the plaintiffs in the present case, in a brazen attempt in an ultimately failing case. This court shall explain this disillusionment further into this judgment.

[15] Now, this court must highlight that up until this point, in succinct elaboration of the whole process of the foreclosure proceedings, there was not a single mention of Talam as a party. Talam remains completely a foreign entity disparate and segregated from the foreclosure. Talam was not a party, a non-issue and not even a consideration. Talam is completely disjointed with the bank, absolutely lacks even a spec of nexus with the borrower and is ultimately a total alien and stranger to the facilities and the charge involving the property. Talam was not a consideration at all at the time the facilities were granted. Talam was not a consideration at all at the time of the default. Talam was not a consideration at all at the time of the commencement of the foreclosure. Talam was not at all a consideration upon the successful auction of the property. Save that indeed Talam was previously a corporate guarantor of the borrower, but such guarantor – guarantee relationship does not remotely exist in the present case.

Talam's alleged interest in the property and partisanship in the charge

[16] Now, bearing in mind the previous preliminary conclusion that Talam is undoubtedly an alien and a stranger and foreign to the charge and facilities, this court shall move on to at least summarise the disenchanting case that the CHDSB and Talam led in the present case.

[17] CHDSB's proprietary interest in the present case is very clear. It was the registered proprietor of the property and also the chargor in the third party charge. Thus, the proprietary interest of CHDSB can be derived from:

(a) statutory rights under the National Land Code, Companies Act 1965, Contracts Act 1950 and other statutes which may govern the relationship between the bank as chargee and CHDSB as the chargor;

(b) contractual rights derivative from the terms of the charge annexure dated 28 November 2005 (see exh P7 of bundle B); and

(c) any implied duties and/or obligations presupposed by the law of equity against a chargor and/or chargee.

[18] However, it is the furiously contended interest of Talam which disillusioned this court the most. As an alien and a stranger, foreign to the charge and facilities, the following are the tangents which Talam sought to argue its interest over the property:

(a) vide the settlement agreement and supplementary settlement agreement with MBI ('settlement agreement') CHDSB has vested all its rights over the properties to Talam to allow Talam to dispose the land in accordance with the settlement agreement;

(b) the defendants are estopped from denying Talam's proprietary interest as they have allegedly conducted themselves in affirmation and acknowledgment to Talam's interest;

(c) in acknowledging Talam's interest the bank owes a duty of care in torts and equity to cater to Talam's interest;

(d) Talam claims proprietary interest as shareholder of Maxisegar who is the majority shareholder of Cekap Mesra, in which Cekap Mesra has entered into a joint venture agreement ('JV') and a supplementary joint venture agreement ('supplementary JV') with CHDSB, in which according to the cll 2.3, 2.6 and 2.9 of the supplementary JV, CHDSB shall hold the property as a bare trustee for the benefit of Cekap Mesra. (This court must highlight that the foreign Talam is not even a direct shareholder of Cekap Mesra. Talam is a separate entity who is merely a shareholder of another corporate entity ('Maxisegar') which Maxisegar is a majority shareholder of Cekap Mesra)

[19] On the aforesaid grounds, both Talam and CHDSB have sought the following remedies from this court which, inter alia, includes:

> (i) General damages to be calculated based on the 2nd Defendant's conduct, through the 1st Defendant, of acting as if the public auction would not be proceeding on 7 September 2010 which prevented the Plaintiffs from redeeming the Property;
>
> (ii) An order that the Defendants pay the Plaintiffs, damages, in the amount of RM33,697,902 being the difference in the reserve price and the market value of the Property; and
>
> (iii) General damages for the Defendants' breach of duty of care towards the Plaintiffs
>
> (collectively referred to as 'Claim for Damages')

[20] Even before this court can begin to discuss the proprietary rights of the plaintiffs (particularly the foreign Talam), there a number of preliminaries must first be determined before the ensuing determinations can be set in motion.

PRELIMINARIES

Is the plaintiffs' action barred by res judicata?

[21] This court does not intend to deal with this issue at length. The parties' clashing contention on this issue is succinctly on the application of the recent Federal Court decision in *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779.

[22] The defendants' stance is simply that by virtue of the decision in the *Metroplex* case, the Federal Court has extended the application of the doctrine of res judicata notwithstanding the claim being a claim in rem or in personam. The defendants contend that the *Metroplex* case has to an extent overruled the trite principle propounded in the Federal Court decision in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 with respect to the applicability of the doctrine of res judicata over proving 'cause to contrary' against charge actions under s 256(3) of the National Land Code 1965 ('the NLC'). The defendants relied upon para 28 of the decision in *Metroplex* which held:

> [28] For the above reasons, we answer the leave question in the affirmative and in the following terms: Issues pertaining and or relating to 'cause to contrary' could only be raised in the charge action. A chargor is therefore barred from bringing a fresh action against a charge, in order to raise issues which show a 'cause to contrary', regardless of whether the chargor had or had not raised such issues at the stage of the chargee's application for an order for sale of the charged property under s 256 of the National Land Code.

[23] However, this court humbly disagrees with this contention by the learned counsel for the defendants. A comparative reading of the principle held in the *Metroplex* case (in its entirety) would reveal that the Federal Court in *Metroplex* case has in fact followed the decision in *Low Lee Lian*.

It was decided in *Low Lee Lian* that:

> If the chargor is unable to sustain his opposition to the making of an order for sale – *a proceeding in rem* – he may nevertheless sue the chargee *in personam* for breach upon the personal covenant or in equity for such relief as may be appropriate.

[24] The Federal Court in *Metroplex* has actively discussed and differentiated the bar of res judicata in case of an action in rem and in personam and this court would highlight the conclusion in the preceding paragraph leading up to the conclusion in para 29 which was relied upon by the defendants:

> Hence, the action ... *was not an action in personam but an action in rem and which could not be brought.*

[25] Thus, preliminarily it is this court's decision that the plaintiffs' case here is not barred by the doctrine of res judicata.

Is the unmarked ID36 settlement agreement admissible in court?

[26] Now, this court shall turn to one of the most pivotal issue to be determined at this preliminary juncture. This court must highlight that the settlement agreement ('ID36') was not marked as an exhibit in the present case. And indeed, there are valid reasons behind the fact that the court refused to mark ID36 as an exhibit.

[27] This issue is verily pivotal in view of the fact that the plaintiffs' case voluminously depend on the operability and enforceability of the settlement agreement against the defendants. It is simply the most tangible avenue in which Talam intends to draw its far-fetched nexus as a foreigner to the charge.

Gross confusion and failure to reconcile versions of the settlement agreement

[28] Now, this court must highlight from the outset, that the plaintiffs have done close to nothing to reconcile and explain the gross differences of the versions which shall be discussed further down this judgment. In reading the submissions in reply of the defendants, the plaintiffs merely assert that ID36 tendered was an 'original' even without attempting to address the gaping inconsistencies revealed by learned counsel for the defendants.

[29] To the astonishment of this court, there are altogether four versions of the settlement agreement which had reached into the files of the present case in which even the plaintiffs to the end of the trial completely fail to explain and justify the glaring discrepancies between the four versions put into court. At best, the plaintiffs merely attempted to explain the discrepancy between two of the versions namely ID36 and ID14 but eschewed completely from the task to explain the discrepancy of ID36 with D77 and D85. For clarity in understanding these discrepancies, the following are the respective tendered versions of the settlement agreement, and a brief background of which these versions made its way into this court which are ID14, ID36, D77, and D85)

ID14 file copy version

[30] ID14 was the initial file copy of the settlement agreement which the plaintiffs relied upon BEFORE the defendants requested for the original copy of the settlement agreement. This court must highlight that as soon as this request was made, the plaintiffs completely ceased to refer to ID14.

[31] ID14 does not contain the utterly important three endorsements (inclusive of CHDSB's endorsement transferring all rights to the property to Talam) which all too conveniently appear in ID36 which is now alleged to be the original by the plaintiffs.

[32] ID14 contains the share certificates in appendix 5 which was not contained in appendix 5 of ID36

So ultimately, comparative to ID36:

(a) ID14 does not have endorsements which are available in ID36; while

(b) ID36 does not have the share certificates which are available in ID14

ID36 alleged solicitor's 'original' copy version

[33] Reiterating the above, the plaintiffs were requested to produce the original copy of the settlement above by the defendants. Now, it is utterly important to note that it was undisputed that the plaintiffs have failed to find and produce their own 'original' copy upon this request.

[34] Instead, the plaintiffs purport to tender ID36 which was contended to be their previous solicitor's 'original' copy ('alleged original').

[35] The differences between ID36 and ID14 are as explained earlier above in the heading for ID14.

[36] It is utterly important that this court is overwhelmed by the perplexing conduct of the plaintiffs in losing such an integral document which would enormously affect its health as a business entity. The settlement agreement involves a sum of not merely millions but tens of millions of ringgit which adds to the gravity and importance to safe keep the document. It is thoroughly perplexing that a litigant, who fiercely and ferociously guards its alleged interest in the property, would lose such an enormously important piece of document and evidence.

D77 MBI'S original version

[37] D77 is simply MBI's version of the settlement agreement which was exhibited in MBI's previous affidavit in respect of the Shah Alam High Court Originating Motion No 25–55 of 2011).

[38] D77's traits are similar as ID14. It does not contain the all-important endorsements and contains share certificate in appendix 5.

The plaintiffs' failure in reconciliation and explanation on the discrepancies

[39] However, the plaintiffs' attempt to explain the discrepancies above falls utterly flat. There are a plethora of grounds in which this court has no hesitation at all to doubt the authenticity of ID36. This court shall categorically address these grounds below:

[40] With regard to the absence of the endorsements in ID14, the plaintiff vide its witness PW1 (Chua Kim Lan – first plaintiff's executive director), explains that the reason that the endorsements are not included in the file copy is because the endorsements were only executed after the signing of the settlement agreement. The endorsements were included post-signing but was included prior to the stamping of the agreement. The endorsements were forwarded to their solicitors before stamping but however, their solicitors never included the endorsements into the file copy ID14.

[41] Meanwhile, with regard to the absence of the share certificate in ID36 (which is contained in ID14 and D77), PW1 explains that the share certificate which was attached in ID14 was removed from ID36 for safekeeping.

Gross and total contradiction with the plaintiffs' own witness (PW5)

[42] PW5 (Ganesheraj Selvarajah – a partner in Messrs Jayadeep, Hari & Jamil) was the previous solicitor who dealt with the signing and the execution of the settlement agreement. His testimony directly contradicts every single one of PW1's attempt to reconcile the differences of the versions.

Contradiction with regard to the endorsements

[43] Against PW1's contention it was PW5's evidence and admission that he is absolutely clueless as to the fact that ID14 and D77 (being MBI's version of the settlement agreement) would leave out the endorsements simply for the reason that any endorsements were forwarded and inserted into all the original copies of the settlement agreement before the settlement agreements were stamped. It was also his admission that there are no other versions of the settlement agreement which was forwarded to Kumpulan Darul Ehsan Bhd ('KDEB') and MBI except the stamped settlement agreements.

[44] Hence, these two admissions literally rendered the explanation regarding the absence of endorsements of ID14 and D77 (which is MBI's original copy) improbable by any stretch of the legal and factual imagination. ID14 and D77 and ID36 were executed, inserted all endorsements, and stamped at the same time. If there is any deduction to be drawn here is that it

is more probable than not that the versions of the settlement agreement without the endorsements are the original versions of the settlement agreement.

The bafflements revealed from the contradictions above are these:

(a) ID14 and D77 could not have left out the endorsements if they were the same originals which were stamped together and sent to MBI and KDEB. Thus, ID36 could not in any extent of probability be an authentic original copy of the settlement agreement, since the other originals did not contain the same endorsements; and

(b) it remains unexplained that two alleged 'originals' particularly ID36 (solicitor's original) and D77 (MBI's original), executed at the same time, inserted with the same endorsements, dealt with by the same solicitors, stamped at the same time are vastly different in its contents (particularly the crucial endorsement).

[45] This court could not help to feel that it is far too convenient for the plaintiff that the unexplained discrepancy that arose between the originals just by sheer 'coincidence' happens to be the endorsement of rights by CHDSB which remains to be an imperative piece of document which plays to the plaintiffs' favour.

Contradiction with regard to the share certificate

[46] This next contradiction is also another contention which totally disillusioned this court on the veracity of the plaintiffs' case evidence regarding the absence of the share certificate in appendix 5 of ID36.

[47] PW1's evidence on the absence is that the share certificate in ID36 was removed for safekeeping. From this testimony it is reasonable to infer that PW1 testifies that what was attached on ID36 is the share certificate itself. However, in total contradiction with PW1's assertion PW5, the solicitor who dealt with the settlement agreement instead testified that at all times the agreements were attached with the photocopies of the share certificate.

[48] Henceforth, the explanation afforded by the plaintiffs does not hold water here. The solicitor handling the settlement agreement itself testified that the share certificates attached were mere photocopies. Thus, there are no conceivable reasons behind the removal of the photocopy from ID36 as it was merely a photocopy, and there is really no reason at all to remove the same for safe keeping.

[49] This court must also highlight that it is far too much of a coincidence that the three endorsements were suddenly executed without any contingent clauses requiring such execution of endorsements. The execution of the three endorsements completely derails from the general mechanism of the settlement agreement in the requirement for endorsements. As correctly pointed out by the defendants, all other endorsements (besides the three contended endorsements) were executed contingent or in relation to a specific clause under the settlement agreement requiring the execution of such endorsement. However, such clauses in relation to the three contended endorsements were nowhere to be found in the settlement agreement, thus adding further shade of improbability over the plaintiffs' case in this regard.

[50] In light of the above unexplained baffling and perplexing discrepancies, this court has no reservation to discredit the authenticity of ID36 as a purported original copy of the settlement agreement and therefore deems ID36 completely inadmissible in the present case.

[51] This court takes guidance from s 62, Explanation 2 of the Evidence Act 1950 as clearly, the numerous purported originals do not fall under Explanation 1 as they are not executed in several parts or in counterparts. The purported originals falls squarely under Explanation 2 as they were printed, executed and stamped together:

> Explanation 2 – Where a number of documents are *all made by one uniform process*, as in the case of *printing*, lithography or photography, each is primary evidence of the contents of the rest; ...

[52] The learned counsel for the defendants have accurately referred to the immensely narrow threshold of discrepancy allowed in the documents under Explanation 2 in referring to *Sarkar on Evidence* (15th Ed 1999) with regard to documents made by uniform process:

> The case of a type-machine (the ordinary printing-press or its equivalent) is different. Here the *only variances that can occur between different numbers reproduced by printing must arise from a change in the type or from the exhaustion of the ink.* But the ordinary printing-press is now self-feeding in respect of ink; and on the supposition that the type is not intentionally altered, all the reproductions from the same setting of type may be regarded for practical purposes as identical and equivalent.

[53] Clearly in the present case the purported originals greatly differ more than just its type or font. Thus, there is significant improbability of ID36 to be considered as primary evidence as it clearly fails in the allowable threshold of discrepancy. Thus, there is a serious doubt to the probability of ID36 to be an original copy of the settlement agreement.

[54] Therefore, since the settlement agreement relied on by the plaintiffs is not to any extent an original , the settlement agreement fails to fulfil the criteria of admissibility of documentary evidence under s 73A(1) of the Evidence Act 1950 (see also *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; *Allied Bank (M) Sdn Bhd v Yau Jiok Hua* [2006] 5 MLJ 145 (CA)).

[55] Naturally then, in line with the trite principle decided by Abdoolcader J in the case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, this court shall totally disregard the settlement agreement in totality in the determination of the present case. Simply put, ID36 is utterly and ultimately inadmissible.

[56] Even if the MBI settlement is admissible, it still remains that it has no bearing at all in the present case. The bank is not a party and not privy to the settlement agreement. The settlement agreement is not enforceable against the bank to defeat its statutory right to foreclose the property.

[57] It is trite and true that no party(ies) to a contract may impose the contract's obligations against a third party non-partisan to the contract and no third party stranger to the contract can enforce the terms of a contract in which it is not privy to (see (a) *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, (b) *The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 MLJ 554; [2006] 1 CLJ 259).

[58] The facts of the present case beg for no lengthy discussion on this matter. It is undisputed that the signatories of the settlement agreement is only MBI and Talam and none others. It was even admitted by PW1 that the only contractual relations involving the bank is only the facilities agreement between the bank and Keuro Leasing:

OMK Now do you agree with me that the only contractual relationship that exists in this situation that we are in, is the contractual relationship between the 1st Defendant and Keuro Leasing, in respect of the loans related to it?

CHUA Yes.

TALAM'S TOTAL LACK OF ACTUAL, EQUITABLE, AND BENEFICIAL INTEREST OVER THE PROPERTY

[59] Categorically, Talam claims beneficial interest over the property on numerous suppositions. This court shall now proceed to categorically address all these suppositions by the plaintiffs.

Talam's alleged beneficial interest vide CHDSB's bare trust to the benefit of Cekap Mesra

[60] Even the heading itself sounds incredulous and dubious considering the distant nexus of the foreign Talam with Cekap Mesra. Adding salt to the wound, Talam is not even the direct shareholder of Cekap Mesra. Talam is merely the shareholder of another company, Maxisegar who happens to be the majority shareholder of Cekap Mesra.

[61] Now, even before the court even delved into the nexus vide the alleged bare trust created vide the supplementary JV between CHDSB and Cekap Mesra, this court must emphasise that in actuality, the existence of a bare trust is really a moot point and bears no significance with Talam's total lack of beneficial interest. This is simply for the reason that it is already trite as a time-tested rule of law that the effect of incorporation dictates that a body corporate and its assets are totally separate and distinct from its shareholders. Thus, in essence even if there exist a bare trust between CHDSB and Cekap Mesra, Talam still cannot claim any degree of rights (be it beneficial or actual rights) over the assets of Cekap Mesra. What more considering that Talam is not even the direct shareholder of Cekap Mesra.

[62] For the sake of clarity on Talam's total lack of beneficial rights, this court firstly refers to the landmark decision of the English Court of Appeal in *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619:

> Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

[63] Clearly here, that no shareholder has any rights over the company's assets right from the moment the company was incorporated right until the company meets its demise.

[64] The defendants also appropriately point out that the same doctrine of separation of entities even extends to the loss of a subsidiary company and that a parent company does not have the necessary standing to commence an action for the loss of its subsidiary company and the proper plaintiff should be the subsidiary suffering the personal loss (see *Barings Plc (in liquidation) & Anor v Coopers & Lybrand (A Firm) & Ors* [2002] PN 16).

[65] Even in the local chapter it has already been decided by the Court of Appeal in the case of *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822 that in view of the fact that a holding

company does not hold 100% shares of its subsidiary while the remainder of shareholding was held by third parties, the holding company cannot claim rights whatsoever over the subsidiary's assets. The Court of Appeal concludes:

> The plaintiff company is the registered proprietor of the said property. Although WTK is a shareholder of the plaintiff company, this does not give WTK the right to deal with the property of the plaintiff company, *let alone to give the plaintiff's property away*. The plaintiff as a company as a company duly incorporated under the Companies Act 1965, is a separate legal entity from its shareholders ... (Emphasis added.)

[66] By way of incorporation of the holding company and the separate incorporation of the subsidiary company, Talam cannot now contra on its own pursuit and preference of separation of entities (through the medium of corporations) and claim otherwise as and when it is opportune and preferable to the holding company (see *Tate Access Floors Inc & Anor v Boswell & Ors* [1991] Ch 512).

Further proof of separation vide the charge annexure executed by CHDSB

[67] Adding more proof to the facade set up by the plaintiffs, this court refers to the charge annexure executed by CHDSB dated 28 November 2005. Sections 4.01 and 4.02 of the charge annexure clearly stipulates that CHDSB (as chargor) is the only party holding beneficial and/or actual ownership of the property so charged. The sections are reproduced here for the sake of convenience:

> Section 4.01 REPRESENTATIONS AND WARRANTIES
>
> The Chargor hereby represents and warrants to the Lender as follows –
>
> ...
>
> (g) that the *Chargor is the beneficial owner or has good and valid title to all their assets*
>
> ...
>
> Section 4.02 TRUTH AND CORRECTNESS OR REPRESENTATIONS AND WARRANTIES
>
> (a) The chargor acknowledges that the Lender has accepted this Charge and on the basis of, and in full reliance upon, the aforesaid representations and warranties, which will be correct and complied upon ...

[68] PW1 and PW3 (Ng Lai Tin – former Senior Vice President 1 and Director of Keuro Leasing) in their evidence brazenly testified that the charge annexure is inaccurate owing to the fact that the annexure is a merely standard document. This court stresses that no signatory of any contract can feign

ignorance to whatever he has covenanted in the contract (see *Serangoon Garden Estate Ltd v Marian Chye* [1959] 1 MLJ 113).

[69] Alluding to the sections above, unless CHDSB owns up to the beneficial and actual ownership of the property, then CHDSB's conduct in making the above representations in sections 4.01 and 4.02 is akin to a misrepresentation against the bank. Thus, again further proving that Talam has no beneficial interest over the property whatsoever. In fact, such brazen testimony of PW1 and PW3 go adversely against the veracity of their evidence. PW3 cannot simply state that the charge annexure signed is a standard charge document which does not reflect the real relationship of the parties. It begs this court to question the credibility of the witnesses' testimony considering the fact that they are not simple laymen, and the charge involves a massive amount of land and facilities.

Absence of bare trust

[70] This court does not intend to discuss this contention at length owing to the earlier finding that this contention is mostly moot and a non-issue. However, this court must highlight that even this tangent of argument by the plaintiffs ultimately fails as the plaintiffs have failed to fulfil all the elements of a bare trust.

[71] Simply put, in order to prove the existence of a bare trust, it must be proven that: (a) the purchase price has been paid in full; and (b) the vendor/trustee must give to the purchaser a duly executed valid memorandum of transfer (see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12).

[72] It is patently clear from the testimony of PW1 that it was admitted that the plaintiffs do not have any proof of such payment of purchase price was ever made by Cekap Mesra or any other company on behalf of Cekap Mesra (see notes of evidence ('NOE') on 9 December 2014 at pp 4, 14, and 15).

[73] It was also admitted that no such memorandum of transfer was ever executed (see NOE on 8 December 2014 at p 18).

[74] It is this court's finding that CHDSB does not hold the property on bare trust for the benefit of Cekap Mesra. Naturally flowing from this fact, there is no beneficial interest that Talam can claim to begin with arising from Cekap Mesra.

Non-compliance of s 132C(1)(b) of the Companies Act 1965

[75] This is also another non-issue owing to the inadmissibility of ID36 as the settlement agreement. However, it is worth noting that that since ID36 is inadmissible, the entirety of the settlement agreement in whatever version shall be deemed null and void on the ground that the inadmissibility of CHDSB's endorsement deems the settlement agreement to be in contravention of the condition precedent under s 132C(1)(b) of the Companies Act 1965. The section reads:

> Section 132C. Approval of company required for disposal by directors of company's undertaking or property
>
> (1) Notwithstanding anything in the memorandum or articles of association of company, the directors shall not carry into effect any arrangement or transaction for –
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the disposal of a substantial portion of the company's undertaking or property
>
> *Unless the arrangement or transaction has been approved by the company in a general meeting.*

[76] Thus, since CHDSB's endorsement cannot be proven in the present case, it remains that the settlement agreement is in total contravention of mandatory provision above and should be deemed void and unenforceable (see *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 3 CLJ 141).

Inapplicability of the equity of redemption

[77] Another tangent in which Talam purports to prove its beneficial interest is to prove that Talam is a party with an interest under the equity of redemption. In simple terms, based on the equity of redemption, Talam is allegedly within the realm of parties who may be affected from the properties' loss of value upon its sale. The plaintiffs refer to the case of *Burgess v Auger and another* [1998] 2 BCLC 478.

[78] On a preliminary note this court would at this early juncture dismiss this contention as this additional cause of action was not pleaded in the plaintiffs' statement of claim. The plaintiffs have particularised the rights in equity that the plaintiffs allege to have and nowhere was there any mention of an action for the equity of redemption. Thus, on a preliminary note this court has no hesitation dismiss this contention by the plaintiffs (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196).

[79] On another note, this court lauds the bold (but ultimately failing) preposition by the plaintiffs but also loathes the same preposition owing to the fact that the plaintiffs do not even have the courtesy to even explain or even attempt to distinguish the decision of our own Supreme Court in *Malayan United Finance v Tay Lay Soon* [1991] 1 MLJ 504 which in plain words has decided that the equity of redemption does not apply in Malaysia. It is appalling to think that learned counsel for the plaintiffs won't even address this authority and bring it to the knowledge of the court. It is akin to submitting into court outdated and inapplicable law. The Supreme Court has already decided that:

> The equity of redemption and discharge of a charge are poles apart ...
>
> It certainly would avoid confusion if the term equity of redemption should not be used at all in dealing with a charge under the Code because in other jurisdictions, besides England, it conveys an entirely different idea ...
>
> Equity of Redemption' is a misnomer but persistence in its use is not a matter of law but of habit in Australia and *in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia ...*
>
> *To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical.* (Emphasis added.)

[80] Even assuming that this court would for even a microsecond accept and apply the doctrine of equity in redemption (which this court vehemently does not), any interest under redemption purported to be drawn by the plaintiffs is again, terribly distant and unreasonable. Going by the authority relied upon which is the *Burgess* case. The interest in equity in redemption was defined as an interest which may be directly affected from the property's supposed loss of value. And in the *Burgess* case, this interest in equity of redemption was given to a *guarantor* to the mortgage in the mortgagor – mortgagee relationship.

[81] Now in the *Burgess* case, it seems that the prescription of such interest must strictly cover persons or interests which are verily close in proximity and not a stranger to the mortgage. A guarantor is not a stranger to the mortgage. A guarantor is a variable and a consideration that the mortgagee takes into account in deciding whether or not to grant the facilities. It is easier to draw such foresee ability of a guarantor's interest compared to Talam's foreign position.

[82] However, comparing the nexus of a guarantor to a charge to the nexus of Talam, who is not a guarantor and not even named in the charge document or was not even a concern or considered in the granting of the facilities to begin with, there are no conceivable likenesses between the foreign Talam and a guarantor to a charge or mortgage.

[83] If the court were to ever agree with this contention, then the consideration and duty of the bank to third parties and persons outside of the statutory and contractual relationship of the charge would be limitless and ultimately incredulous. It is erroneous that a financial institution in putting the nation's economy in motion would have to cater to so many interests near and far, close and foreign, partisan and non-partisan to the facilities and charge agreements and the statute. This court is not prepared to warrant, and in fact, the facts of the present case are far from warranting such a sweeping supposition of interest to Talam.

Talam cannot put itself in the shoes of the chargor, CHDSB

[84] A charge is statutorily governed and contractually governed. It is incredulous to draw Talam a non-partisan to the charge to be under the statutory and contractual umbrella when Talam is foreign to the charge document and consequently foreign to the statutory provision of the NLC.

Thus, it is this court's decision that Talam to any extent whatsoever does not hold any rights over the property.

ANALYSIS OF THE PARTIES' CONDUCTS

[85] The plaintiffs have at extreme lengths contended on certain conducts of the defendants which in turn, results in the following alleged consequences in law:

(a) the bank should be estopped from denying the operability and enforceability of the settlement agreement;

(b) the bank should be estopped from denying that Talam has beneficial interest to deal with the land;

(c) the bank should be estopped from denying that it owes a duty of care against Talam; and

(d) the conducts of the bank raise a legitimate expectation against the plaintiffs that the defendants acknowledge and affirm the settlement agreement;

[86] This court believes that a repetitive discussion of the conducts in different aspects of the laws contended would be too redundant, as the analysis over the conducts to a certain extent remains the same. Thus, this court shall address the purported legal consequences of these conducts separately and directly apply the laws contended against these conducts. However, it is imperative for the court to be minded of the laws submitted before going in-depth with the analysis, application and conclusion.

Law on estoppel

[87] It is to no surprise of the court that the plaintiffs will refer to the landmark decision by the Federal Court in the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331; [1995] 4 CLJ 283 which the Federal Court has succinctly discuss the evolution of the law on estoppel in analysing the conducts of parties. The Federal Court has referred to Lord Denning's decision in the *Amalgamated Investment* case which reads:

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at p 122) as follows:
>
> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with case. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so.* (Emphasis added.)

(See also (a)*Affin Bank Berhad v Mohd Kassim Ibrahim* [2013] 1 CLJ 465; (b)*Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 WLR 401)

Law on duty of care

[88] Now, there is very little novelty in the plaintiffs' case in attempting to cast the arm of duty to cover Talam as a 'neighbour' to the bank. Of course references were made to the landmark English decision in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and also the case of *Donoghue v Setevenson* [1932] AC 562, (HL) (Sc).

[89] Nevertheless, the plaintiffs' submission in extending the duty of care over the foreign and stranger Talam remains a novelty. In attempting to prove this novel supposition of duty of care, the plaintiffs have at length referred to a plethora of authorities to first urge this court to have an 'open-ended approach' in consideration of their submissions. It is the plaintiffs' submission that this court should remain open in defining new relationships to be within the proximity of the duty of care (see (a) *Majlis Perbandaran Ampang Jaya v Steven*

Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, (b) *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27; [2012] 9 CLJ 699).

[90] However, more proximate to the facts in the present case, it is the plaintiffs' contention that mere knowledge of the identity of persons may be a test of proximity. The plaintiffs relied upon the case of *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

[91] On a preliminary note, this court would refer to the defendants' contention on the proper appreciation on the rule of proximity. This court appreciates the defendants' reference to the case of *Architype Projects v Dewhurst MacFarlane & Partners (A Firm)* [2004] PNLR 39 which clearly has decided that the *Junior Book* case should only be followed in cases which are identical to *Junior Book*'s unique facts. And this court wholly concurs with this submission as the relationship proximity decided in *Junior Book* is aptly different from the present case. *Junior Book* dealt with the relationship between a contractor or sub-contractor and an employer which understandably the relationship between these parties may to a degree be foreseen to intertwine with one another. An employer employs a contractor and the contractor employs a sub-contractor to achieve the same result, which is the performance of the initial contract. However, Talam's relationship with the chargee is a world apart from the proximity dealt with in *Junior Book*'s case. And in fact, Talam's relationship with Cekap Mesra is already dictated by its own set of trite rule which is the doctrine of separation of entity. There is just no conceivable manner at all that this court would be moved to define a new relationship of proximity with the given facts of the present case.

[92] It is appropriate to refer to the case of *Stovin v Wise* [1996] AC 923 to reconcile the analysis above:

> the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties *is so close that it is just and reasonable to permit recovery in tort.* (Emphasis added.)

[93] The bank is the chargee, who at best caters to the interest of its customers and chargors. And Talam is neither a customer nor a party to the charge.

[94] There is a total absence of justification for the court to decree a new category of proximity for the alleged relationship of Talam (foreign and non-partisan from the charge) with the bank.

[95] As was highlighted by the defendants, the venerated relationship between a chargor and chargee is already contractually governed between the

signatories of the charge document and even statutorily governed by the NLC. Any duties must be derivative of the statute and the charge document and must only cover persons who are a party in the charge and the statute.

[96] The duties and obligations of the chargor and chargee have been meticulously detailed in the statute and the contract and the court must respect the autonomy of the PARTIES to the charge and none other.

[97] To simply draw a nexus to a third party (in this case, Talam) who is utterly disjointed, foreign and could not have been within the contemplation of the charge is a blatant insult to the sanctity of the rule of privity.

[98] What more when it is already a trite law that even the shareholders of a body corporate is disparate from the company and the shareholders cannot deal and claim the company's assets. Adding salt to the plaintiff's wounds is the fact that it is also the law that a holding company cannot deal with the assets of its subsidiary.

[99] Therefore, it is this court's preliminary finding that the defendants do not owe any duty of care against the foreign and stranger Talam. It matters not if the defendants indeed knew of Talam's identity as this court could not possibly define such outrageous relationship to be in proximity of the duty of care.

Law on legitimate expectation

[100] The law on legitimate expectation is simply that a party should not be allowed to approbate and reprobate. It is the plaintiffs' contention that the defendants' conducts have led or encouraged the plaintiffs to believe that it agrees to the operability of the settlement agreement. The plaintiffs squarely relied on the case of *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417.

Bank's conduct: payment of quit rent

[101] It is the plaintiffs' contention that the act of the bank in paying the quit rent over the property on the purported request of Keuro Leasing is somehow a conduct signifying an affirmation to the settlement agreement. However, this court holds no hesitation to wholly disagree with this contention. The fact was that the bank received a letter from the Selangor Land and Mines Office dated 10 May 2010 (see exh D81 of bundle B2) informing of CHDSB's failure to pay the quit rent in an arrears of RM158, 840. It must be noted that this letter was not carbon copied to CHDSB or Keuro Leasing. The letter was personal to the

bank. Thus, as a prudent financial institution, the bank acted in protecting its interest over the property against any risk of the land being forfeited back by the state under s 100 of the National Land Code 1965.

[102] The payment was made purely to protect the bank's interest and was not made in the interest of the settlement agreement. It was CHDSB's failure to pay the quit rents that puts the land at risk of forfeiture. And this risk is exactly the sole reason the bank was cornered to pay the quit rent.

[103] Furthermore, this court is not about to allow CHDSB to benefit from its own folly in failing to pay the quit rent. The plaintiffs come to this court seeking for a supposed equitable right. However, it is already trite law that he who does not come with clean hands shall never enjoy the protection and benefit of equity.

Bank's conduct: attendance at the meeting with MBI on 16 March 2010 and 24 March 2010 and the issuance of the redemption statement dated 6 April 2010 ('redemption statement')

[104] The plaintiffs then claim that the bank's attendance during the meetings with MBI and also the issuance of the redemption statement to MBI dated 6 April 2010 are conducts which acknowledge Talam's beneficial interest over the property and the operability of the settlement agreement.

[105] This court finds no difficulty at all to find that the plaintiffs' contention above preposterous. With regard to the bank's attendance in the meeting on 16 March 2010, it is the plaintiffs' own witness ('PW3') who has readily admitted that the bank has never agreed and/or committed to anything during this meeting. In fact it was even admitted that the main agenda of the meeting is merely to put the auction proceedings in 'abeyance'. The literal meaning of the word 'abeyance' as defined by the *Oxford's Dictionary* is 'A state of temporary disuse or suspension'. It is verily important to note that the plaintiffs' own witness that admits that the meeting's purpose was not even to pursue the full withholding or withdrawal of the auction proceedings. It was understood that the auction proceedings was still on-going and was never put to rest (see NOE – 6 February 2015 at pp 73–76).

[106] With regard to the bank's attendance during the meeting on 24 March 2010 this court also highlights that PW2 (Datin Paduka Low Siew Moi – Advisor for Menteri Besar Incorporation (MBI)) has already admitted that the meeting led to no such acknowledgment or commitment to the settlement agreement. It was further admitted that this meeting is merely a general meeting to all financial institutions to inform of a probable settlement with MBI. It was admitted that none of these financial institutions have agreed or

committed to the proposed settlement. In fact, it was even admitted that at that point in time, there was nothing for the bank to agree on since the proposed settlement was only between MBI and Talam (see NOE – 4 February 2015 at p 109).

[107] With regard to the issuance of the redemption statement, it is plain to ascertain that even in such act of giving an opportunity to MBI to redeem the land, the bank has never intended to play by the rules of settlement agreement and completely reserved its rights to continue with the auction proceedings notwithstanding the settlement agreement. The grounds of this finding are as follows:

(a) the bank's redemption statement's validity period has never coincided with the timeline and estimated settlement conclusion of the settlement agreement. This is all too clear comparing Keuro Leasing's letter dated 8 March 2010 to the bank with the expiration date of the redemption statement. The letter indicates that the tentative date of settlement would be on 31 July 2010 while (in disinterest to the terms of the settlement agreement) the bank's redemption statement expires on 30 June 2010. This is already a positive indication that the bank is disinterested to play by the rules set by the settlement agreement;

(b) if it was true that the bank is in agreement with the settlement agreement, the bank would have issued the redemption statement until the final date of the settlement. Instead, the redemption statement is valid only until 30 June 2010. This is instead an act negating the settlement agreement and in fact a positive act of the defendant to reserve its right to enforce the charge in case the plaintiffs fail to adhere to the redemption statement;

(c) in fact, the act of the bank in refusing to issue further redemption statement is also a positive act solidifying their disinterest and disagreement with the settlement agreement;

(d) furthermore, the material term stipulated in the redemption statement clearly reserves the bank's right to continue with the auction proceedings notwithstanding the settlement agreement. The redemption statement reads:

> The redemption sum must be received by us in full and not later than the later/latest of the above redemption date *failing which this redemption statement shall lapse and cease to be of any further effect …*
>
> Where the Loan is in arrears/outstanding, *this redemption statement is issued without prejudice to the Bank's right to recover the amount owing or to institute any legal proceedings to protect the Bank's interest.*

(e) and it is verily important to appreciate that even the plaintiffs' witnesses (PW2 and PW3) have admitted that the redemption statement indeed reserves the above right for the bank. They also admitted that MBI was aware of the reservation of rights (see NOE – 4 February 2015 at p 138; NOE – 6 February 2015 at p 77); and

(f) the issuance of the redemption statement is without prejudice of the defendant's rights to exercise the charge and auction off the land. This issuance is merely the bank's courtesy to give the CHDSB, Keuro Leasing or MBI more time to pay, which ultimately they still fail to pay.

[108] If the bank really intends to adhere and agree to the settlement agreement, it would have gone as far as to withdraw its application for order for sale/ foreclosure proceeding. The mere fact that there were no such withdrawal at all material times, proves that the bank never adhered to the terms of the settlement agreement and intends to reserve its statutory rights to foreclose the property.

[109] It is already patently clear that the plaintiffs' own witnesses that the meeting never reached to any finality with the bank's affirmation of the settlement agreement and even foreign Talam's beneficial interest in the property.

[110] In fact when the defendants were first informed of the proposed settlement agreement, the content of Keuro Leasing's letter informing of the settlement agreement, does not mention that Talam would deal with the land and sell off the land to MBI. Instead, what was informed was that in the prospect of an associate company entering into a settlement agreement with MBI, the property happens to be identified to be part of the settlement programme and that MBI is interested to redeem the land at RM6.6m. Nowhere was it stated that the foreign Talam would be the party disposing the property. Nowhere was it stated that the redemption exercise would be conducted between MBI and the bank vide Talam. This is the status quo set forth by Keuro Leasing. This is the status quo of the parties' understanding in the dealing of the property. Talam was never represented to the disposing party in the status quo. And neither of the parties, especially the plaintiffs sought to retort and correct this status quo. Keuro Leasing's letter dated 8 March 2010 merely states (see bundle B at p 48):

> We are pleased to inform that our associate company ... ('Talam') will be entering into a Settlement Agreement with ... ('MBI') sometime this week. Under the Settlement Agreement, MBI has identified the Danau Putra Land as part of the settlement programme which *MBI will redeem the chargee Bank, Bangkok Bank a redemption sum of not more than RM6.6 million.* (Emphasis added.)

Vividly, there is not even an iota of mention that Talam is the disposing party.

[111] Thus, the attendance of the defendants in the meetings and even the issuance of the redemption statement were in a clear and untainted understanding and status quo that Talam was not the disposing party and that Talam does not have the beneficial interest to dispose the property.

Bank's conduct: requesting for a long date for the auction on 7 September 2010

[112] Somehow in the plaintiffs' untamed imagination, this request for a long date for the auction was seen as an act of 'postponement' in agreement to the settlement agreement. However, it is this court's considered view that the plaintiffs in their grand illusions have read too much into this request.

[113] The request for the long date is merely made out of intrigue considering that the bank was only recently informed of the settlement agreement. And this intrigue was not without reservations. It must be borne in mind that notwithstanding CHDSB's opposition against the auction, the bank's solicitors remained steadfast contending for the continuous procession of the auction proceedings. And this is reflected in the minutes of the case management report on 1 April 2010 which reads (see exh D87 at bundle B3 at p 4):

> Ppff: phn SFD dijalankan dan Mah boleh bagi tarikh lelong panjang jika Def nk settle this matter.
>
> Mah proceed SFD

[114] The bank has never at any point in time deserted or abandoned its stance to follow-through with the auction proceedings. This fact is further cemented considering the fact that the same reservation to pursue the auction was similarly set up in the issued redemption statement.

Bank's conduct: alleged verbal agreement to issue a further redemption statement

[115] It is the salient duty of this court to test the veracity of the oral testimony of the witnesses against the entirety of the facts and contemporaneous documents surrounding the case and ascertain the probability or improbability of their testimony in analysis of all these considerations and variables (see (a) *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, (b) *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97).

[116] PW6 (Roos Haini bt Mansor – an executive with Keuro Leasing) testified that DW2 (Rajendran Palaniappan), who is the second defendant has verbally agreed to issue a further redemption statement. However, this court has serious doubts as to the probability of such verbal affirmation.

[117] Firstly, the testimony of PW6 with regard to the actual verbal affirmation by DW2 has been anything but consistent. Upon examined regarding the actual words of affirmation, PW6 has testified three different versions of the verbal affirmation despite being asked to quote it ad verbatim. The first version was 'Yes, I will give you', which then changed to 'Ok, I will give you', and finally was totally changed to 'Ok, we will come up with the letter'.

[118] Secondly, this court finds it difficult to come to grips with the contention that in the short approximate five minutes telephone call, that DW2 would make such a crucial affirmation regarding a matter which involves millions of ringgit.

[119] Thirdly, in contrast with all the contemporaneous documents, which are the redemption statement and the minutes of the case management, the explicit consistency of the bank's stance in disagreement with the settlement agreement, it is this court's considered view that PW6's testimony is verily improbable.

[120] Lastly, in full knowledge of the gravity of the importance of this further redemption statement, the fact that PW6 never saw it fit or proper to reconfirm the verbal agreement in writing in any shape or form, begs this court to plunge the veracity of PW6's testimony further into the realm of improbability.

[121] Therefore, in view of all the preceding discussions, it is this court's considered view that there is absolutely nothing that could be inferred from the defendants' conduct that would raise any of the contended estoppel raised by the plaintiffs.

[122] Furthermore, this court has discussed at large and in details on the supposed acts of the defendants and this court is in total disagreement of this contention by the plaintiffs. None of the acts alleged were conducts which could have led to the plaintiff's legitimate expectations that the defendant would adhere and allow the settlement agreement. Thus, this contention on legitimate expectation shall ultimately and utterly fail.

THE BANK HAS NOT BREACHED ITS DUTY OF CARE AGAINST CHDSB

[123] At this juncture, it is imperative that this court reiterates that the defendants do not owe any duty of care against Talam, the first plaintiff. Thus, the following discussion on the bank's duty of care is strictly with regards to the bank's duty as a chargee over CHDSB as the chargor.

[124] The plaintiffs in contending on the bank's duty of care has referred to numerous decisions from foreign jurisdictions which dealt with the relationship between a mortgagor and a mortgagee. These cases are namely the case of *Forsyth & Another v Blundell & Others* [1973] 129 CLR 477, *Palk v Mortgage Services Funding Plc* [1993] Ch 330, and *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd and Others* (1978) 19 ALR 519. Generally, these decisions all indicate that the duty of the mortgagee is at liberty to protect his own interest, but in doing so he cannot unfairly prejudice the interest of the mortgagor (see *Palk v Mortgage Services Funding Plc* [1993] Ch 330).

The bank's alleged breach of duty in disallowing the settlement agreement to attain a higher price for the property sale

[125] Preliminarily, this court reiterates that there are severe repercussions when CHDSB as chargor has failed to challenge the TD Aziz evaluation report during the charge action. The undisputed and unchallenged TD Aziz evaluation report is an admitted, affirmed and acknowledged proof of the property's appropriate market value at the time of the auction. Thus, it is no longer open for the plaintiffs to contend against the price in which the property was auctioned off (see *People Realty Sdn Bhd v Hong Leong Bank Bhd & Anor* [2007] 6 MLJ 595).

[126] Thus, the failure to challenge the TD Aziz evaluation report remains largely relevant as it is a total acknowledgment of the propriety of the evaluation of the property's market price at the time of the auction.

The failure to challenge is failure to prove any measure of damages or loss.

[127] Even in view of the chargor's interest, the absence of any challenge to the evaluation report is the chargor's acknowledgment that the valued market price is proper and not in any manner improper against the interest of the chargor.

[128] Mahadev Shankar JCA has held in the case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662; [1997] 2 CLJ 516 that:

> If the power of sale is exercised in good faith for the purpose of protecting his security, then he is not liable to the chargor *even though he might obtain a higher price and even though the terms might be regarded as disadvantageous to the chargor.* (Emphasis added.)

[129] However, it is pertinent to note that the local chapter in Malaysia has demarcated and starkly distinguished the principle of a charge and mortgage. As rightfully referred by the plaintiffs, Peh Swee Chin J in *Bank Bumiputera*

Malaysia Bhd v Doric Development Sdn Bhd & 2 Ors [1988] 1 MLJ 462 has decided:

> In the first place, the premise that a charge under National Land Code is the same as an English mortgage at common law is patently *erroneous.* A charge is governed by detailed statutory provisions of the National Land Code while an English mortgage at common *was a horse of a different colour altogether.* (Emphasis added.)

[130] It was also decided by the Federal Court in the case of *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 that:

> The concept of the *English mortgage is not consistent with the Torrens System. This is because in a mortgage the title passes from the mortgagor to the mortgagee whereas a duly registered charge under the NLC only creates a legal interest in the land … There is no such thing as the English mortgage in the Malay states.* (Emphasis added.)

[131] Thus, by principle the whole discourse on the bank's duty of care is premised on the case of *Lim Poh Ho* above and not on the numerous cases dealing with mortgages.

[132] Nonetheless, turning back to the allegation at hand, the question remains to be whether or not CHDSB has been unfairly prejudiced from the sale of the property vide the auction.

[133] First of all, let this court be clear with whose interest should the chargee bank consider in auctioning off the land. It seems that the plaintiffs are very loose in determining the 'interest of chargor' in the application of authorities they purport to rely on.

[134] Now, what is clear up to this point is that the chargor is the second plaintiff, CHDSB. If any meaning of the 'interest of the chargor' was to be subscribed it would strictly be the interest of CHDSB. This court has already found that Talam cannot be equated to be the chargor at even the farthest logical and legal imagination. Simply put, the interest of CHDSB as chargor is vastly disparate from the interest of the foreign Talam.

[135] At this juncture, this court would recollect and remind the true essence of the settlement agreement. Is the settlement agreement a debt settlement of CHDSB? Clearly it is not. The settlement agreement is for the settlement of foreign Talam's debt. Again, to whose interest does the settlement agreement caters to? Resoundingly, the settlement agreement is engineered to the utmost benefit of the foreign Talam and not CHDSB as the chargor. Simply put, even if Talam were to secure a valid settlement (which this court vehemently disagrees) any higher price paid would only go to the benefit of the foreign Talam to absolve its debts. None of the higher sum paid would go to the benefit

of CHDSB as a body corporate separate to Talam. CHDSB would only get its property back unencumbered. To which, the same benefit to CHDSB would remain the same even if the property were to be sold vide the auction or by the settlement agreement. Clearly now, the benefit so strenuously fought by the plaintiffs is not benefit of the chargor, but the extremely foreign Talam.

[136] Thus, even with the holistic operation and application of the mass of authorities leaned upon by the plaintiffs, it does nothing at all to salvage the plaintiffs' ultimately fallacious, faltering and dying case.

[137] Here, it is sufficient that the bank has already auctioned of the property based on the unchallenged TD Aziz evaluation report. The interest of the chargor would have already been catered to from this auction. Any higher price attained from the settlement agreement would not benefit the chargor CHDSB. There is no reason for the bank to look beyond its diligence to ascertain the market price of the property for the mutual benefit of the bank and the chargor. There is no reason at all for the bank to consider the settlement agreement which concerns a party (Talam) who is foreign to the charge and in fact, was never in any position to deal with CHDSB's assets at all and/or any material time.

[138] Furthermore, to say that the bank has not at all given CHDSB as chargor any opportunity to pursue this opportunity is incorrect. Even without adherence and agreement to the terms purported in the bogus agreement, the defendant did issue the redemption statement for CHDSB to redeem the property in pursuing this supposed settlement (notwithstanding and not in accordance with the settlement agreement) which the plaintiffs ultimately failed to obtain in the duration of the validity of the redemption statement.

The bank's alleged breach of duty in informing of its stance against the settlement agreement

[139] In the dying bid to salvage the plaintiffs' case learned counsel of the plaintiffs have contended that the defendants have failed to be clear of its stance against the settlement agreement particularly in the meetings with MBI and also in reference to a line of correspondences that the defendants left without response.

[140] With regard to the meetings, this court reiterates the earlier finding that it has already been admitted by the plaintiffs' own witnesses that the bank has done nothing to commit or agree to the settlement agreement in any of the meetings. And even if the defendants kept their silence, there is no room for the plaintiffs' to infer a tacit acceptance owing to the fact that the bank has already made it clear during the hearing for summons for directions, the case

management on 1 April 2010 and also the issuance of the redemption statement that the bank intends to reserve its rights to continue with the auction proceedings. And it is already a trite principle that, silence is never any form of acceptance to a covenant or contract.

[141] There is no duty against the defendants to inform of its stance. The defendants have been patently clear with its stance to keep with the procession of the auction even with the issuance of the redemption statement.

[142] The string of unanswered letters which were brought to the attention of this court does nothing to prove any sort of breach of duty (which the defendants never owed to begin with). It is the plaintiffs' own delusions that brought to their own unwarranted imagination that the defendants have agreed to stand with the settlement agreement, and their own misguided delusion that the defendants ought to owe a duty to negate such (non-existent) acknowledgment over the settlement agreement.

[143] The plaintiffs cannot derive any positive act of affirmation from the non-response to the line of letters when the defendants have clearly reserved its rights vehemently to proceed with the auction and not adhere to the settlement agreement.

The bank's alleged breach of duty in failing to inform the plaintiffs that the bank only allows redemption up to 30 June 2010

[144] This court is in utter amazement with respect with the plaintiffs' delusion that the bank would owe such duty.

[145] Firstly, it suffices that the redemption statement has already indicated the time in which MBI has to redeem the land. It is enough of a notice that the bank would no longer be interested to deal with MBI beyond the expiration of the redemption statement.

[146] Secondly, the mere fact that the redemption statement was set to expire even before the performance of the settlement agreement, is already a vivid indication that the bank is not even remotely interested to abide by the terms of the settlement agreement. It matters not if the bank has knowledge of the identity of Talam, or the probability of this settlement. What matters is that the defendants never conducted itself to encourage the plaintiffs' wild imaginations and the bank never intended to play by the rules of the settlement agreement.

THE COURT'S DECISION AND DIRECTIONS

[147] In light of all of the above findings, it is this court's decision that the plaintiffs have ultimately failed to prove their case on the balance of probabilities.

[148] This court hereby dismisses the plaintiffs' action with costs to both the defendants.

On the issue of costs

[149] Having delivered the judgment, the parties were then invited to submit on the issue of costs. Mr Oommen, counsel for the defendants stood up and informed this court they are ready with their written submission to address this court on the issue of costs. However, Mr Chin, counsel for the plaintiff had informed this court that he is not ready to submit on the issue of costs and requested time to address the court on this issue. This court had obliged Mr Chin's request for adjournment and fixed this case for another date for parties to submit on the issue of costs.

Claim dismissed.

Reported by Ashok Kumar